Perbadanan Kemajuan Negeri Selangor v Selangor Country Club Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01–240–06 OF 2013
ZAWAWI SALLEH, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
24 JUNE 2016

Civil Procedure — Appeal — Interference by appellate court — Whether trial judge had in effect rewritten contract between parties — Whether there was misdirection by trial judge on law and facts — Whether appellate intervention necessary

Contract — Construction of terms of contract — Sale and purchase agreement — Failure by PKNS to deliver document of title to SCCSB — Whether upon true construction of 1999 agreement PKNS obliged to deliver up to SCCSB document of title to club land with category of land use 'Bangunan' and express condition 'Bangunan Perniagaan' — Whether PKNS breached 1999 agreement — Whether language of agreements plain and unambiguous and applied accurately to existing facts — Whether legal maxim id certum est qod certum redid protest applied — Whether trial judge in effect rewritten contract between parties — Whether trial judge had taken into account extraneous factors when interpreting agreements — Damages — Whether loss and damages due to breach of contract by PKNS — Whether there was any evidence to prove amount of damages claimed

On 20 December 1994, Perbadanan Kemajuan Negeri Selangor ('PKNS') had entered into an agreement ('the 1994 agreement') to sell a piece of land situated in Sungai Buloh ('the land') to Selangor Polo and Equesterian Centre Sdn Bhd ('SPEC'). Subsequently on 23 September 1999, PKNS, SPEC and Selangor Country Club Sdn Bhd ('SCCSB'), a wholly owned subsidiary of SPEC, entered into an agreement ('the 1999 agreement') whereby SPEC with PKNS's consent agreed to sell 30.7 acres of the land ('the club land') to SCCSB. Thereafter SCCSB had developed the club land as a club business with facilities and buildings built on the club land with plans to develop a residential project on the land. PKNS through its general manager had accepted and signed the layout plans and pre-computation plans with regard to the development of the club land. However, despite repeated reminders from SCCSB, PKNS had not obtained the document of title to the club land from the State Government of Selangor. On 6 September 2012, PKNS informed SCCSB that its application for the document of title to the club land had been rejected. This prompted

SCCSB to file an action against PKNS for breach of contract. SCCSB's claim was predicated upon the premise that the granting of the document of title to the club land was the responsibility of PKNS pursuant to cl 3.1 of the 1999 agreement, which provided that PKNS or SPEC should 'use their best endeavours to cause the issuance of the document of title' to the club land in favour of SPEC to facilitate the eventual transfer to SCCSB. In its defence PKNS submitted, inter alia, that it had performed its obligations under the 1999 agreement when it used its best endeavours to obtain the document of title to the club land and that the 1999 agreement was frustrated when PKNS's application for the document of title to the subject land was rejected by the state authority. PKNS also submitted that pursuant to cl 18 of the 1994 agreement SPEC was responsible to obtain the document of title. PKNS also counterclaimed for declarations that the 1999 agreement was null and void or that the 1999 agreement had been frustrated. The trial judge found that the 1994 agreement should be read together with the 1999 agreement, and that when cl 18 of the 1994 agreement and cl 3 of the 199 agreement were read together it was clear that PKNS as the owner of the land was obliged to obtain the document of title to the land. As PKNS had failed to obtain the document of title, the trial judge allowed SCCSB's claim for specific performance that required PKNS to deliver up to SCCSB a separate document of title to the club land with the category of land use 'Bangunan' and express condition 'Bangunan Perniagaan' and in lieu thereof damages in the sum of RM161,252,586 and general damages to be assessed. This was PKNS's appeal against the decision of the High Court. PKNS submitted that in making the orders that she had, the trial judge had in fact rewritten the contract for the parties. PKNS also argued that no evidence had been led at the High Court to show that the damages suffered by SCCSB amounted to RM161m.

Held, allowing the appeal with costs:

(1) The key words underpinning PKNS obligation in cl 3.1 of the 1999 agreement were 'use their best endeavours' and in cl 18 of the 1994 agreement 'to take such steps as may be necessary'. These key words did not impose any obligation on PKNS to obtain the issue document of title to the club land. As a general rule, where the language of the document was plain and unambiguous and applied accurately to existing facts, it was the duty of the court to accept the ordinary meaning and to allow the express provisions of the instrument to continue to operate undisturbed. What was germane to this issue was the applicability of the legal maxim *id certum est qod certum redid protest* (defined as 'that is certain which can be made certain'). This maxim applied to the words used in cl 3.1 of the 1999 agreement and cl 18 of the 1994 agreement. There was no word in either clause to suggest that PKNS had undertaken to deliver up to SCCSB the document of title to the club land with the category of land use 'Bangunan' and express condition 'Bangunan Perniagaan'. As such, it

was not for the trial judge to insert an implied term in a contract unless such term was made requisite by necessary implication either from the context or the surrounding circumstances (see paras 32–38 & 41).

(2) Although SCCSB relied on the evidence of the subsequent conduct of the parties, it is settled law that an agreement could not be construed in the light of the subsequent conduct of the parties. By taking into account extraneous factors the trial judge had in effect rewritten the contract between the parties. By ordering PKNS to deliver up the issue document of title to the club land, the trial judge had given something that was not asked for. Further the trial judge had incorporated the additional conditions that the document of title to the club land should include the category of land use 'Bangunan' and express condition 'Bangunan Perniagaan'. However, the power to alienate the land, prescribe a category of land use and express conditions for any alienated land was vested solely in the state authority and it was not within the jurisdiction of the High Court to grant such order. Thus, there was a misdirection by the trial judge on the law and on the facts (see paras 42–46 & 50).

(3) As to damages, it is settled law that in order for SCCSB to succeed in its claim it had to show that the loss and damages was due to the breach of contract by PKNS. Once that was established SCCSB had the additional burden of proving the damages. However, after perusing the appeal record it was clear that there was no evidence to prove the facts and the amount of damages as claimed. As such, there was a misdirection on the law and on the facts by the trial judge in awarding the sum of RM161m in damages (see paras 51–52).

[Bahasa Malaysia summary

Pada 20 Disember 1994, Perbadanan Kemajuan Negeri Selangor ('PKNS') telah membuat suatu perjanjian ('perjanjian 1994') untuk menjual sebidang tanah yang terletak di Sungai Buloh ('tanah') kepada Selangor Polo and Equestrian Centre Sdn Bhd ('SPEC'). Selanjutnya pada 23 September 1999, PKNS, SPEC dan Selangor Country Club Sdn Bhd ('SCCSB'), sebuah syarikat subsidiari yang dimiliki sepenuhnya oleh SPEC, telah membuat suatu perjanjian ('perjanjian 1999') bahawa SPEC dengan persetujuan PKNS bersetuju untuk menjual 30.7 ekar tanah ('tanah kelab') kepada SCCSB. Kemudian, SCCSB telah membangunkan tanah kelab itu sebagai sebuah perniagaan kelab dengan kemudahan dan bangunan dibina di atas tanah kelab dengan perancangan untuk membangunkan sebuah projek kediaman atas tanah itu. PKNS melalui pengurus besar SCCSB telah menerima dan menandatangan pelan susun atur dan pelan pra-pengkomputeran berkenaan dengan pembangunan tanah kelab itu. Walau bagaimanapun, meskipun terdapat beberapa peringatan daripada SCCSB, PKNS tidak memperoleh dokumen hakmilik tanah kelab daripada Kerajaan Negeri Selangor. Pada 6 September 2012, PKNS telah memaklumkan SCCSB bahawa

permohonannya untuk mendapatkan dokumen hakmilik tanah kelab telah ditolak. Perkara ini menyebabkan SCCSB memfailkan suatu tindakan terhadap PKNS bagi suatu pelanggaran kontrak. Tuntutan SCCSB telah dibuat berdasarkan premis bahawa pemberian dokumen hakmilik tanah kelab merupakan tanggungjawab PKNS menurut klausa 3.1 perjanjian 1999, yang memperuntukkan bahawa PKNS dan SPEC hendaklah menggunakan ikhtiar yang terbaik untuk mengeluarkan dokumen hakmilik kepada tanah yang memihak kepada SPEC untuk memudahkan pemindahan kepada SCCSB. Dalam pembelaannya, antara lain, bahawa ia telah melaksanakan tanggungjawabnya di bawah perjanjian 1999 apabila ia menggunakan ikhtiar yang terbaik untuk mendapatkan dokumen hakmilik kepada tanah kelab dan bahawa perjanjian 1999 telah digagalkan apabila permohonan PKNS untuk mendapat dokumen hakmilik tanah itu telah ditolak oleh pihak berkuasa negeri. PKNS juga menghujahkan bahawa menurut klausa 18 perjanjian 1994 itu, SPEC bertanggungjawab untuk mendapatkan dokumen hakmilik itu. PKNS juga membuat tuntutan balas untuk suatu deklarasi bahawa perjanjian 1999 adalah tidak sah dan terbatal atau bahawa perjanjian 1999 out telah gagal. Hakim perbiacaraan mendapati bahawa perjanjian 1994 hendaklah dibaca bersama dengan perjanjian 1999, dan bahawa apabila klausa 18 perjanjian 1994 dan klausa 3 perjanjian 1999 dibaca bersama, adalah jelas bahawa PKNS sebagai pemilik tanah itu hendaklah mendapatkan dokumen hakmilik tanah. Oleh sebab PKNS telah gagal, hakim perbicaraan telah membenarkan tuntutan SCCSB untuk suatu pelaksanaan spesifik yang memerlukan pihak PKNS untuk mengemukakan kepada SCCSB suatu dokumen hakmilik tanah kelab yang berasingan dengan kategori penggunaan tanah 'Bangunan' dan syarat nyata 'Bangunan Perniagaan' dan sebagai ganti itu, ganti rugi berjumlah RM161,252,586 dan ganti rugi am akan dinilai. Ini merupakan rayuan pihak PKNS terhadap keputusan Mahkamah Tinggi. PKNS menghujahkan bahawa dalam membuat perintah yang dibuat olehnya, hakim perbicaraan telah dengan sebenarnya menulis semula kontrak pihak-pihak. PKNS juga menghujahkan bahawa tidak terdapat keterangan yang ditunjukkan di Mahkamah Tinggi untuk menunjukkan bahawa ganti rugi yang dialami oleh SCCSB berjumlah sebanyak RM161 juta.

Diputuskan, membenarkan rayuan dengan kos:

(1) Perkataan utama yang menyokong tanggungjawab PKNS dalam klausa 3.1 perjanjian 1999 adalah 'use their best endeavours' dan dalam klausa 18 perjanjian 1994 'to take such steps as may be necessary'. Perkataan utama yang penting ini tidak mengenakan apa-apa tanggungjawab ke atas PKNS untuk mendapatkan pengeluaran dokumen hakmilik terhadap tanah kelab. Sebagai peraturan am, di mana bahasa dokumen adalah biasa dan jelas dan terpakai dengan tepat terhadap fakta sedia ada, ia adalah tanggungjawab mahkamah untuk menerima maksud biasa dan untuk membenarkan peruntukan nyata

instrumen untuk terus beroperasi tanpa diganggu. Apa yang berkaitan dengan isu ini adalah penerapan maxim undang-undang *id certum est qod certum redid protest* (ditafsirkan sebagai 'that is certain which can be made certain'). Maxim ini diterapkan kepada perkataan yang digunakan dalam klausa 3.1 perjanjian 1999 dan klausa 18 perjanjian 1994. TIdak terdapat perkataan dalam salah satu klausa untuk mencadangkan bahawa PKNS telah mengambil untuk menyerahkan kepada SCCSB dokumen hakmilik kepada tanah kelab dengan kategori kegunaan tanah 'Bangunan' dan terma nyata 'Bangunan Perniagaan'. Oleh itu, ia bukanlah untuk hakim perbicaraan memasukkan satu terma tersirat dalam kontrak melainkan terma sebegitu dibuat sebagai syarat oleh implikasi perlu sama ada daripada konteks atau keadaan sekitar (lihat perenggan 32–38 & 41).

(2) Walaupun SCCSB bergantung kepada keterangan kelakuan seterus pihak-pihak, ia adalah undang-undang tetap bahawa satu perjanjian tidak boleh ditafsirkan bersabit dengan kelakuan seterus pihak-pihak. Dengan mengambil kira faktor tambahan hakim perbicaraan telah menulis semula kontrak antara pihak-pihak. Dengan memerintahkan PKNS untuk mengemukakan dokumen hakmilik keluaran tanah kelab itu, hakim perbicaraan telah memberi sesuatu yang tidak dipohon. Tambahan lagi, hakim perbicaraan telah memasukkan syarat tambahan bahawa dokumen hakmilik keluaran tanah kelab itu sepatutnya memasukkan kategori penggunaan tanah 'Bangunan' dan syarat nyata 'Bangunan Perniagaan'. Walau bagaimanapun, kuasa untuk beri hakmilik, menetapkan suatu kategori penggunaan tanah dan syarat nyata bagi mana-mana tanah diberi hakmilik terletak hanya kepada pihak berkuasa negeri dan bukanlah dalam bidang kuasa Mahkamah Tinggi untuk memberikan perintah itu. Oleh itu, terdapat tersalah arah oleh hakim perbicaraan tentang undang-undang dan fakta (lihat perenggan 42–46 & 50).

(3) Berhubung dengan ganti rugi, ia adalah suatu undang-undang yang mantap bahawa bagi membolehkan SCCSB berjaya dalam tuntutannya, ia hendaklah menunjukkan bahawa kerugian dan kerosakan adalah disebabkan pelanggaran kontrak oleh PKNS. Sebaik sahaja hal itu berjaya dibuktikan, SCCSB mempunyai beban tambahan untuk membuktikan kerosakan itu. Walau bagaimanapun, setelah meneliti rekod rayuan, adalah jelas bahawa tidak terdapat keterangan untuk membuktikan fakta dan amaun ganti rugi yang dituntut. Oleh itu, terdapat tersalah arah berkenaan dengan undang-undang dan fakta oleh hakim perbicaraan apabila mengaward wang berjumlah RM161 juta sebagai ganti rugi (lihat perenggan 51–52).]

Notes

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 1353–1395.

For cases on sale and purchase agreement, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 4427–4437.

Cases referred to

Attorney General of Belize and others v Belize Telecom Ltd and another [2009] UKPC 10; [2009] 2 All ER 1127, PC (refd)

Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals [2009] 6 MLJ 839, CA (refd)

Bonham-Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177, KBD (refd)

Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65, CA (refd)

Smt Kamala Devi v Seth Takhatmal and another 1964 AIR 859, SC (refd)

Lam Kee Ying Sdn Bhd v Lam Shes Tong & Anor [1974] 2 MLJ 83, PC (refd)

Lee Sau Kong v Leow Cheng Chiang [1961] 1 MLJ 17, CA (refd)

North Eastern Rly Co v Lord Hastings [1900] AC 260, HL (refd)

PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd [2009] 7 MLJ 681, HC (refd)

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)

Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229, CA (refd)

Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 2 All ER 260; [1973] 1 WLR 601, HL (refd)

Legislation referred to

Evidence Act 1950 s 94

National Land Code ss 5, 52, 116, 120, 121, 122

Appeal from: Originating Summons No 24–123–01 of 2013 (High Court, Shah Alam)

Gopal Sri Ram (SN Nair, T Sudhar, CK Lim, K Murali, Edward Kuruvilla and David Yii with him) (SN Nair & Partners) for the appellant.

Muhammad Shafee Abdullah (HL Teh, Sara Ann Chay Sue May, Shaafzan bt Aminulah and Muhammad Farhan Shafee (PDK) with him) (HL Teh & Assoc) for the respondent.

Vernon Ong JCA:

INTRODUCTION

[1] This appeal relates to a decision of the Shah Alam High Court given on 8 May 2013 whereby the defendant Perbadanan Kemajuan Negeri Selangor

('PKNS') was ordered to deliver up to the plaintiff Selangor Country Club Sdn Bhd ('SCCSB') the original document of title to the subject land with the category of land use 'Bangunan' and subject to the express condition 'Bangunan Perniagaan' by 7 January 2014 failing which PKNS is to pay SCCSB RM161,252,586 in damages.

[2] In this judgment, the appellant shall be referred to as PKNS and the respondent as SCCSB respectively.

BRIEF ACCOUNT OF THE SALIENT FACTS

[3] On 20 December 1994, PKNS entered into an agreement ('the 1994 agreement') with Selangor Polo & Equestrian Centre Sdn Bhd ('SPEC') for the sale of a piece of land known as Section 10 Area 6 of Pusat Pertumbuhan Baru Sg Buloh, Mukim Sungai Buloh, Daerah Petaling, Selangor DE comprising of approximately 50 acres ('the land').

[4] Pursuant to an agreement entered on 23 September 1999 ('the 1999 agreement') between PKNS of the one part, SPEC of the second part and SCCSB of the third part, SPEC with PKNS's consent agreed to sell a portion of the land measuring approximately 30.70 acres ('the club land') upon the terms and conditions therein contained. SCCSB is a wholly owned subsidiary of SPEC.

[5] For the purposes of this appeal, the pertinent clauses in the 1999 agreement are as follows:

> Clause 1.1
>
> The Vendor with the consent of the Corporation hereby agrees to sell and Purchaser hereby agrees to purchase the Club Land free from all encumbrances whatsoever and with vacant possession but subject to all conditions of title whether express or implied affecting the same and to any restrictions in interest applicable thereto.
>
> Clause 3.1
>
> As soon as practical after the execution of this Agreement, the Corporation and/or the Vendor shall use their best endeavours to cause the issuance of the separate document of title to the Club Land in favour of the Vendor to facilitate eventual transfer to the Purchaser or alternatively cause the separate document of title to be issued directly in the name of the Purchaser.
>
> Clause 3.2
>
> In the event that the separate document of title is issued in the name of the Vendor and the approval of the State Authority is required for the transfer of the Club Land to the Purchaser, the Corporation and/or the Vendor shall apply for and obtain such

State Approval in favour of the Purchaser.

Clause 3.3

The Corporation will pay the premiums payable to the State Authority to facilitate the issuance of the separate document of title to the Club Land abut in the event that the Purchaser shall, subsequent to the execution of this Agreement, make or apply for any change in the category of land use of the Club Land from that as currently stated in the Layout Plan annexed hereto as ANNEXURE A, the Purchaser shall pay for the different or the additional premiums payable arising from such change in the category of land use from the existing use to such other use.

Clause 5

Each party hereto shall be entitled to the remedy of specific performance against the other in the event of a failure by any party to perform its obligations under this Agreement.

[6] On 22 November 2010, the document of title in respect of a portion of the club land comprising an area of approximately 6.88 acres was issued. According to the document of title, the category of land use is stated as 'Bangunan' and express condition as 'Bangunan Perniagaan'.

[7] The dispute between PKNS and SCCSB relates to the remaining portion of the club land compromising an area of approximately 25.53 acres ('the subject land').

[8] At the hearing of the appeal the court was informed that the document of title to the subject land was issued on 10 March 2014; ie after the completing of the proceedings in the High Court. According to the document of title, the category of land use is stated as 'Bangunan' and express condition as 'Padang Polo'. The document of title to the subject land was admitted in further evidence by this court on 4 March 2015.

SCCSB'S CLAIM

[9] SCCSB's claim for specific performance requires PKNS to deliver up to SCCSB a separate document of title to the subject land pursuant to the 1999 agreement and in lieu thereof damages in the sum of RM161,252,586 and general damages to be assessed.

[10] SCCSB's claim is predicated upon the premise that the granting of the document of title to the subject land is the responsibility of PKNS pursuant to cl 3 of the 1999 agreement.

[11] The document of title to the subject land was not yet issued during the

trial of the action at the Shah Alam High Court in 2013.

[12] SCCSB had developed subject land as a club business where the facilities and buildings have been built on the subject land. SCCSB had also submitted an application to develop the subject land as a residential project. Approval of the planning permission for the subject land has been obtained from the Majlis Perbandaran Petaling Jaya ('MPPJ') in 2012. PKNS through its general manager had accepted and signed the layout plans and pre-computation plans. PKNS's General Manager had also signed the letter of undertaking to the MPPJ.

[13] SCCSB issued reminders to PKNS for the document of title to the subject land vide several letters dated 25 November 2010, 14 December 2010, 8 February 2012, 1 March 2012, 23 March 2012, 4 April 2012, 5 July 2012 and 15 August 2012. PKNS replied to these letters informing that they have submitted the relevant applications to the relevant authorities and are waiting for their approval.

[14] By a letter dated 6 September 2012, PKNS informed SCCSB that the State Government of Selangor had rejected the application for the document of title to the subject land.

PKNS' DEFENCE AND COUNTERCLAIM

[15] In essence, PKNS' defence is premised on the following main grounds:

(a) SCCSB's claim should be made against the vendor SPEC under the 1999 agreement and not against PKNS as PKNS is not a party under the 1999 agreement;

(b) SCCSB's claim is time-barred;

(c) the 1999 agreement was frustrated when PKNS' application for the document of title to the subject land was rejected by the state authority vide letter 16 August 2012;

(d) PKNS had performed its obligations under the 1999 agreement when it used its best endeavours to obtain the document of title to the subject land; and

(e) pursuant to cl 18 of the 1994 agreement SPEC is responsible to obtain the document of title.

[16] PKNS also counterclaimed for declarations that (i) the 1999 agreement

is null and void, and or (ii) the 1999 agreement has been frustrated.

FINDINGS OF THE HIGH COURT

[17] In her judgment, the learned judge said that the 1994 agreement and the 1999 agreement should be read together. Reading cl 18 of the 1994 agreement and cl 3 of the 1999 agreement together, the learned judge found that PKNS as the owner of the land is obliged to obtain the document of title to the subject land.

[18] The learned judge dismissed PKNS' argument that it is not a party to the 1999 agreement on the ground that there were correspondences between the parties showing that PKNS applied for the document of title to the subject land and copies of the same were extended to SCCSB. The learned judge also found that PKNS were well aware of their responsibility under the 1994 and 1999 agreements as PKNS applied for and obtained the document of title to a portion of the club land in 2010.

[19] The learned judge found that PKNS failed in its obligation to obtain the document of title to the subject land. PKNS failed to take all steps to obtain the document of title.

[20] The learned judge rejected PKNS' contention that the 1999 agreement had been frustrated when the land office rejected PKNS' application for the document of title; PKNS have yet to lodge an appeal to the land office.

[21] The learned judge also said that in the circumstances the remedy of specific performance is appropriate to be made so as to give effect to cl 5 of the 1999 agreement and to resolve the problem facing SCCSB.

SUBMISSION OF PARTIES

[22] The submission of learned counsel for PKNS was premised on four main issues:

(a) the order for specific performance required PKNS to deliver up the document of title to the subject land pursuant to cl 5 of the 1999 agreement which provides that each party shall be entitled to specific performance. However, the nature of the obligation under cl 3.1 of the 1999 agreement only requires PKNS to use its best endeavours to cause the issuance of the document of title;

(b) the learned judge gave something that was not asked for. First, the High

Court order is different from what is prayed for in the originating summons in that there are additional conditions incorporated into the order, viz, 'dengan kategori penggunaan tanah 'Bangunan' dan syarat nyata 'Bangunan Perniagaan'. PKNS is not the state authority and PKNS cannot be compelled to do something which is beyond its power. Further, it is not an obligation imposed under the 1999 agreement. Second, the default order to pay RM161,252,586 cannot stand as the primary obligation is not compellable. In making the orders that she did, the learned judge was in fact rewriting the contract for the parties. It is trite law that the court should not rewrite the terms of the contract between the parties that it deems fair or equitable (*Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839 (CA));

(c) there was no breach for which specific performance would hold. The issue document of title to the subject land has been issued with the express condition 'Padang Polo'; and

(d) no evidence was led at the High Court to show that the damages suffered amounted to RM161m. There was no valuation report or any other cogent evidence. The only evidence relied on by SCCSB is the alleged offer to buy the subject land at RM145 per sqft. Further, by a letter dated 15 March 2012, PKNS informed SCCSB that PKNS was waiting for the approvals for the application for the issue document of title and that SCCSB was not to enter into any agreement for the sale of the subject land to a third party. Notwithstanding PKNS' said letter, SCCSB vide letter dated 23 March 2012 insisted on going ahead and took the risk. Therefore, PKNS should not be liable for the risk.

[23] SCCSB's argument is premised on the footing that PKNS, SPEC and SCCSB entered into the 1999 agreement with open eyes. Learned counsel for SCCSB argued that the fact that the Menteri Besar sits on the board of directors of PKNS gave confidence to SCCSB to enter into the 1999 agreement. The parties knew that if PKNS breached the undertaking, SCCSB would suffer the consequences of the breach. The rejection of PKNS's application for the issue document of title to the subject land was one of the few instances where PKNS's application to the state authority was rejected.

[24] However, the main thrust of SCCSB's argument is that it was agreed between the parties that the category of land use of the subject land is as per Annexure A (the layout plan of the club land). According to learned counsel, the category of land use stated therein is 'Bangunan' and express condition 'Bangunan Perniagaan'. Further, the pre-computation plan (*pelan pra-hitungan*) is identical to the layout plan. The application for planning permission to MPPJ was approved on that basis. Clause 4.1 of the 1999 agreement envisaged that the issue document of title to the entire club land

should be issued and transferred to SCCSB simultaneously. Instead, the issue document of title was only issued for a portion of the club land comprising of 6.88 acres with the agreed category of land use and express condition in 2010 in accordance with Annexure A.

[25] PKNS did apply wrongly for the issue document of title to the subject land because the application was for 'Padang Polo'. Ultimately, the state authority granted what PKNS wanted. In short, SCCSB's argument is that PKNS undertook to give the issue document of title to the subject land with the category of land use 'Bangunan' and express condition 'Bangunan Perniagaan'. This issue was correctly decided by the learned judge. The learned judge did not rewrite the contract between the parties.

[26] Learned counsel also argued that the learned judge was correct in ordering specific performance and the default order to pay RM161m. The said amount is based on the valuation of the subject land at RM145 per sqft as reflected in the letter of offer dated 23 March 2012 from Suasana Daya Development Sdn Bhd and SCCSB's directors' resolution and on the basis that the subject land is commercial land. Due to PKNS's breach, SCCSB was unable to proceed with the sale of the subject land to the third party.

[27] Lastly, learned counsel for SCCSB submitted that the fact that the issue document of title to the subject land has been issued is irrelevant and makes no difference to PKNS' appeal because the new evidence was not before the learned judge.

OUR DECISION

[28] In our view, the central issue in this appeal relates to the following questions:

(i) whether on a true construction of the 1999 agreement PKNS is obliged to deliver up to SCCSB the issue document of title to the subject land with the category of land use 'Bangunan' and express condition 'Bangunan Perniagaan'?

(ii) whether PKNS breached the 1999 agreement in failing to deliver up the issue document of title to SCCSB; and

(iii) whether SCCSB is entitled to damages in the sum of RM161,586,000?

[29] In holding that PKNS is obliged to deliver the document of title to the subject land the learned judge took the approach that cl 18 of the 1994 agreement and cl 3 of the 1999 agreement should be read together. Before us,

learned counsel for SCCSB also advanced the proposition that PKNS' obligation is premised on the layout plan Annexure A to the 1999 agreement and the pre-computation plans.

[30] Clause 3.1 of the 1999 agreement provides that PKNS and/or SPEC 'shall use their best endeavours to cause the issuance' of the issue document of title to the subject land in favour of SPEC to facilitate the eventual transfer to SCCSB.

[31] In this connection, cl 18 of the 1994 agreement provides as follows:

> The Corporation (PKNS) shall at its own cost and expense *take such steps as may be necessary to obtain the issue of a separate title to the said Land* free from any agricultural or industrial condition expressed or implied and free from any restrictions against the construction of building thereon but any delay in obtaining such document of title shall not be a ground for any delay by the Purchaser in the payment on due dates of the purchase price or any part thereof and the interest thereon (if any) and the Corporation shall not in any way be liable to the Purchaser for any loss damages costs or expenses howsoever arising or incurred due to any delay in the issue of the said separate document of title to the said Land. (Emphasis added.)

[32] The key words underpinning the obligation in cl 3.1 are 'use their best endeavours' and in cl 18 'take such steps as may be necessary'. In our view, the key words do not impose any obligation on PKNS to obtain the issue document of title to the subject land. All that the clauses require of PKNS is that PKNS use its best endeavours or take such steps as may be necessary to obtain the document of title.

[33] As a general rule, the words of an instrument must be construed according to their natural meaning. Where the language of a document is plain and unambiguous and applies accurately to existing facts then the intention of the parties to the document should be gathered from the language of the document itself. No amount of acting by the parties can alter or qualify words which are plain and unambiguous: see s 94 of the Evidence Act 1950; *North Eastern Rly Co v Lord Hastings* [1900] AC 260 (PC).

[34] Accordingly, when a court is called upon to interpret a document, it looks at the language. If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the court is not to delve into the intricacies of the human mind to disclose one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions: see *Smt Kamala Devi v Seth Takhatmal and another* 1964 AIR 859 a Supreme Court of India decision at p 386.

[35] In this appeal, it is clear that the proposition of learned counsel for SCCSB is premised on an implied term: the term being implied by reference to Annexure A, the pre-computation plan and the subsequent conduct of the parties.

[36] The first question we have to decide is whether, on the true construction of the 1999 agreement, the words used can reasonably bear the meaning ascribed to them by SCCSB, or whether they are to be limited, as PKNS contends, to PKNS' obligation to use its best endeavours to obtain the document of title to the subject land. What is germane to this issue is the applicability of the legal maxim *id certum est quod certum reddi potest* (defined as 'That is certain which can be made certain.' *Black's Law Dictionary* (2nd Ed)).

[37] In our view, this maxim applies to the words used in cl 3.1 of the 1999 agreement and cl 18 of the 1994 agreement. There is no word in either cl 3 or cl 18 to suggest that PKNS has undertaken to deliver up to SCCSB the document of title to the subject land with the category of land use 'bangunan' and express condition 'bangunan perniagaan'. It is not for the court to insert an implied term in a contract unless such term is made requisite by necessary implication either from the context or the surrounding circumstances.

[38] The question of implication only arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.

[39] In *Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] UKPC 10; [2009] 2 All ER 1127 (PC), when delivering the advice of the board, Lord Hoffmann said:

> The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

[40] The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority. In *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260 at pp 267–268; [1973] 1 WLR 601 at p 609 Lord Pearson, with whom Lord Guest and Lord Diplock agreed said:

> [T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term *necessary* to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves. (Emphasis added.)

[41] As it stands, cl 3 of the 1999 agreement seems to us to be clear and free from ambiguity, and incapable of any other construction that is assigned to it by SCCSB. Certainly there is nothing to be found in the rest of the 1999 agreement or in the 1994 agreement for that matter to suggest any other interpretation. But it has been suggested that it must have been differently understood by the parties themselves, and that the layout plan Annexure A and the pre-computation plan is cogent evidence that such was the case. We grant that if cl 3 of the 1999 agreement were capable of two constructions, one of which would support, the other of which would defeat SCCSB's claim, the layout plan Annexure A and the pre-computation plan would afford irresistible proof that the former was the interpretation intended by the parties. No such ambiguity, however exists and it seems therefore to us that, in the absence of any proof to the contrary, it must be assumed that the parties knew and understood the language they were using, and that in executing the 1999 agreement containing cl 3 they were truly expressing their intentions, and are bound by the writing they have signed.

[42] We have also considered the subsequent conduct of the parties. Even if there is any substance to SCCSB's contention, we take it as settled law that an agreement cannot be construed in the light of the subsequent conduct of the parties: *Lam Kee Ying Sdn Bhd v Lam Shes Tong & Anor* [1974] 2 MLJ 83 (PC).

[43] For the foregoing reasons, we are satisfied that the learned judge had taken into account extraneous factors and rewrote the contract between the

parties. Accordingly, we are constrained to hold that there was a misdirection by the learned judge on the law and on the facts.

[44] We would also add one observation and it is this: in ordering PKNS to deliver up the issue document of title to the subject land, the learned judge gave something that was not asked for. It is patently clear to us that the High Court order is different from the relief prayed for in the originating summons. The learned judge incorporated these additional conditions into the order — 'dengan kategori penggunaan tanah 'Bangunan' dan syarat nyata 'Bangunan Perniagaan'.'

[45] Whilst on the subject of alienation, category of land use and express conditions, it is necessary to note that the power to alienate land, prescribe a category of land use and express conditions for any alienated land is vested in the state authority.

[46] The state authority is defined in s 5 of the National Land Code ('the NLC') as the Ruler or Governor of the State. Be that as it may, under our constitutional conventions, the Ruler of a State is required to act on the advice of the state Executive Council or a member of the Executive Council (usually the Menteri Besar) except as is otherwise provided by the Federal or State Constitution. Thus, the Ruler may act in his discretion only in prescribed circumstances such as the appointment of the Menteri Besar; the withholding of consent to a dissolution of the Legislative Assembly; and the performance of his functions as the Head of Islam: Tun Mohamed Suffian, *An Introduction To The Constitution of Malaysia* (3rd Ed) 2007; Andrew Harding, *The Constitution of Malaysia*, Hart Publishing 2012.

[47] There are only three categories of land use: (i) agriculture, (ii) building, and (iii) industry (s 52 of the NLC). The category is determined either by the land being within an area subject to a particular category or by the category being determined at the time of the alienation for the individual lot of land. The category of land use entails consequent obligations to comply with the terms and conditions to which the category is subject.

[48] In the case of alienated land subject to the category of land use 'building', four conditions are implied and these implied conditions apply to the extent that they are not inconsistent with any express conditions imposed on the land (s 116 of the NLC). For instance, it is prescribed that a building shall be erected within two years, the land shall not be used for agricultural or industrial purposes and such building shall not be demolished or extended without the consent of the appropriate authority.

[49] In the same vein, the state authority is vested with the power to impose

express conditions: ss 120, 121 and 122 of the NLC. In the case of land falling under the category of land use 'building' and 'industry', the state authority may impose such conditions as it may think fit in respect of which buildings may be erected and other matters (s 122 of the NLC).

[50] In short, even if the additional conditions adverted to in para 42 above were prayed for, it was not within the jurisdiction of the High Court to grant such order as the power to prescribe the land use category and express conditions is vested solely in the state authority.

[51] As to damages, it is settled law that in order for SCCSB to succeed in its claim SCCSB must show that the loss and damages is due to the breach of contract by PKNS. Once that is established, SCCSB has the additional burden of proving the damages. The law on the recovery of damages has been succinctly enunciated by Ramly Ali J (now FCJ) in *PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd* [2009] 7 MLJ 681 at p 697. It may be summarised into two main principles:

(a) the burden of proof is on the party seeking the claim to prove the facts and the amount of damages (*Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65 (CA); *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177; *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 and *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229 (CA)); and

(b) the damages must be proved with real or factual evidence. Mere particulars, summaries, estimations or general conclusions will not suffice (*Lee Sau Kong v Leow Cheng Chiang* [1961] 1 MLJ 17 (CA)).

[52] We have perused the appeal record and find that there is no evidence to prove the facts and the amount of damages as claimed. As such, we are also constrained to hold that there was a misdirection on the law and on the facts by the learned judge in awarding the sum of RM161m in damages.

[53] For the reasons adumbrated above, question (i) is answered in the negative. Consequently, we would also answer questions (ii) and (iii) in the negative.

[54] In conclusion, we allow the appeal with costs. The decision of the learned judge is set aside.

Appeal allowed with costs.

Reported by Kohila Nesan